AUG-20-2003 14:57 LN P.03

DISTRIBUTE OCT 31 2002

FILED
OCT 21 2002
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No. 01-11006

Supreme Court of the United States

WILLIAM VALUCK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONER

WILLIAM VALUCK
13880-058
Maxwell Air Force Base
Montgomery, AL 36112

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SUPPLEMENTAL STATEMENT OF THE CASE

Mr. Valuck has filed a petition for Writ of Certiorari with this Court in which he presented the following question for review:

> Whether 18 U.S.C. § 1956, the statute governing money laundering, should be construed as broadly as the Fifth Circuit did in Mr. Valuck's case, to include any form of 'money spending' involving ill gotten gains, contrary to the holdings of the Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits?

(Petition for Writ of Certiorari, page i)

The government has responded to the petition for Writ of Certiorari by conceding that Mr. Valuck's conviction for violation of 18 U.S.C. § 1956 was upheld by the Fifth Circuit for "depositing and cashing checks" that were drawn by another person against a separate bank account to which Mr. Valuck not a signatory, where the checks were proceeds of completed criminal activity. (Government Response 6)

While the government concedes that a significant division in the federal circuits exists as to whether "whether a transaction can violate Section 1956(a)(1)(A)(i) by promoting the carrying on of an already completed crime", the government argues, however, that the only question presented by Mr. Valuck is whether "spending" proceeds of illegal activity can violate the statute.

Mr. Valuck demonstrates within that (1) the question, whether a criminal defendant can be convicted under 18 U.S.C. § 1956 for depositing and spending the proceeds of already completed illegal activity, is a "subsidiary question fairly included" in the question whether 18 U.S.C. § 1956, "should be construed as broadly as the Fifth Circuit did in Mr. Valuck's case"; and (2) whether a criminal defendant can be convicted under 18 U.S.C. § 1956 for depositing and spending the proceeds of already completed illegal activity is a question which divides the courts of appeals and should be decided by this Court.

ARGUMENT

1.) THE QUESTION, WHETHER A CRIMINAL DEFENDANT CAN BE CONVICTED UNDER 18 U.S.C. § 1956 FOR DEPOSITING AND SPENDING THE PROCEEDS OF ALREADY COMPLETED ILLEGAL ACTIVITY, IS A "SUBSIDIARY QUESTION FAIRLY INCLUDED" IN THE QUESTION WHETHER 18 U.S.C. § 1956, "SHOULD BE CONSTRUED AS BROADLY AS THE FIFTH CIRCUIT DID IN MR. VALUCK'S CASE".

This Court's Rule 14.1(a) provides that "[t]he statement of any question presented is deemed to comprise every subsidiary question fairly included therein."

As set forth above, the government has argued that the question presented in this case is limited to whether "spending of the proceeds of unlawful activity" constitutes a violation of 18 U.S.C. § 1956. (Government Response page 5)

While the government attorney is correct that Mr. Valuck has presented the question whether spending the proceeds of unlawful activity constitutes "money laundering" within the meaning of 18 U.S.C. § 1956, the government attorney has overlooked the fact that the question presented by Mr. Valuck also includes the question "whether 18 U.S.C. § 1956 . . should be construed as broadly as the Fifth Circuit did in Mr. Valuck's case."

It is uncontested that Mr. Valuck deposited a check which was given to him, that Mr. Valuck spent the money, that the check represented proceeds of unlawful activity, and that the unlawful activity which had generated the proceeds was completed by the time that Mr. Valuck deposited and spent the money. The court of appeals held that this deposit necessarily included negotiation of the check as part of the process of depositing it and held that the deposit of the money was the act that constituted the third element of a violation of 18 U.S.C. § 1956; i.e. that the deposit constituted "the financial transaction [which] was conducted with the intent to

promote the carrying on of a specified unlawful activity." (Government Response, page 5) (Petition, Appendix, pages A6-A7)

To the extent that the government attorney has argued that the question presented to this Court is limited to whether spending proceeds of unlawful activity constitutes a violation of 18 U.S.C. § 1956, the government attorney's argument is not well taken and should be rejected by this Court.

Plainly, the question, whether a criminal defendant can be convicted under 18 U.S.C. § 1956 for depositing and spending the proceeds of already completed illegal activity, is a "subsidiary question fairly included" in the question whether 18 U.S.C. § 1956, "should be construed as broadly as the Fifth Circuit did in Mr. Valuck's case".

2.) WHETHER A CRIMINAL DEFENDANT CAN BE CONVICTED UNDER 18 U.S.C. § 1956 FOR DEPOSITING AND SPENDING THE PROCEEDS OF ALREADY COMPLETED ILLEGAL ACTIVITY IS A QUESTION WHICH DIVIDES THE COURTS OF APPEALS AND SHOULD BE DECIDED BY THIS COURT.

As set forth in Mr Valuck's petition for Writ of Certiorari, and conceded by the government in their response, the Court of Appeals for the Fifth Circuit directly held that Mr Valuck's act of negotiating cashier's checks he received from a codefendant, who purchased the cashier's checks from funds wired to the codefendant's checking account by a victim of wire fraud "promoted", within the meaning of 18 U.S.C. § 1956(A)(1)(A)(i), the antecedent crime of wire fraud which was complete and completed when the alleged victim wired funds to the codefendant's account.

In his petition, Mr Valuck has pointed out that this decision by the Fifth Circuit directly conflicts with the decisions of the Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits.

The government attorney does not dispute that Mr. Valuck's case from the Fifth Circuit directly conflicts with numerous Tenth Circuit decisions. See *United States v. Anderson*, 189 F.3d 1201; 1999 U.S. App LEXIS 20037 (10th Cir 1999) ("...this court has cautioned against interpreting the statute so broadly as to "turn the money laundering statute into a 'money spending statute.'" We have recognized the difficulty "of separating money laundering, which is punishable by up to twenty years in prison, from mere money spending, which is legal.") (quoting *United States v. Sanders*, 928 F.2d 940, 946 (10th Cir. 1991) and *United States v. Garcia-Emanuel*, 14 F.3d 1469, 1474 (10th Cir. 1994))

While the government attorney has attempted to distinguish the facts in Mr. Valuck's case from the facts in the conflicting cases from the Fourth, Eighth, and Eleventh Circuit cited by Mr. Valuck, the government attorney has mischaracterized these cases.

For example, the government attorney has argued that *United States v. Jolivet*, 224 F.3d 902, 909 (8th Cir. 2000) is distinguishable from Mr. Valuck's case because, counsel asserts, in *Jolivet* "defendant's 'singular act of depositing settlement checks' that represented proceeds of completed insurance fraud schemes was insufficient to sustain money laundering conviction". (Government Response, page 6)

In *Jolivet*, the government's *argument* was that "Jolivet's acts of endorsing and depositing the checks made the proceeds available for use, thereby furthering the illegal activity" *Jolivet*, 224 F.3d at 909. When the court could find no evidence supporting this *argument*, the court held that depositing the checks and spending the money could not sustain the conviction because it did not "promote" the antecedent unlawful activity.

The government argument in *Jolivet* is the precise same argument made in Mr. Valuck's case but *rejected* by the Tenth Circuit and *adopted* by the court of appeals for the Fifth Circuit; grounds for grant of certiorari by this Court.

The government attorney also argues that *United States v. Calderon*, 169 F.3d 718, 722 (11th Cir. 1999), cited by Mr. Valuck in his petition as another conflicting case, is distinguishable. The government attorney's argument is limited to stating that the holding in *Calderon* was "reversing money laundering conviction where there was no evidence that single deposit of drug proceeds furthered underlying drug trafficking activity". (Government Response, page 6)

In actuality, *Calderon* is directly on point factually, with a directly conflicting legal holding. As in *Jolivet*, and as in Mr. Valuck's case, the government *argued* that depositing proceeds of an antecedent crime had "promoted" the antecedent crime within the meaning of 18 U.S.C. § 1956. Instead of *accepting* this argument as the Fifth Circuit did in Mr. Valuck's case, the Eleventh Circuit *rejected* this argument, holding that "the Government did not present any

evidence showing that Appellant's conduct furthered the alleged underlying narcotics trafficking or that Appellant's conduct added to the profitability of the alleged narcotics trafficking." *Calderon*, 169 F.3d at 722. (emphasis added) Here again, another court of appeals has ruled on a case factually analogous to Mr. Valuck's case but decided the case in a manner directly conflicting with Mr. Valuck's case.

Finally, the government attorney attempts to distinguish the facts in *United States v. Heaps*, 39 F.3d 479, 486 (4th Cir. 1994) from the facts in Mr. Valuck's case. The government attorney has done this by stating that in *Heaps*, "defendant's receipt of payment for completed drug transaction did not constitute money laundering, where there was no evidence of further transactions and 'the only evidence as to what was done with the money after it was sent was that it was put in a box in a drawer of the defendant's house'". (Government Response, page 6)

Here again, the government argument is confusing because the factual scenario is analogous to Mr. Valuck's case, yet the holding is directly contradictory because there simply was no "evidence" in Mr. Valuck's case as to how the deposit of the money "promoted" the antecedent crime.

To the extent that the government *argued* that receipt of the money allowed Mr. Valuck to profit from the antecedent unlawful activity, this is the same *argument* made by the government and *accepted* by the Fifth Circuit but *rejected* by the other courts of appeals. To the extent that the government has argued that the deposit allowed Mr. Valuck to avoid detection by the IRS, this is simply a variation on the argument that it 'allowed Mr. Valuck to profit'. Moreover, this factual circumstance is no different from the factual circumstances in *Heaps* where depositing money in a box kept the money from being detected by the government. It's also analogous to the factual circumstance in *United States v. McGahee*, 257 F.3d 520; 2001 U.S. App. LEXIS

15417 (6th Cir. 2001), where the court of appeals held that writing checks to obtain cash made the funds less available to discover by the government, yet did *not* satisfy the requirements for conviction under 18 U.S.C. § 1956.

As argued by Mr. Valuck in his petition, the split in the circuits is clear cut and the opposing positions are hardening instead of harmonizing. Mr. Valuck's case provides an opportunity for this Court to decide, *in a factually analogous case*, the reoccurring questions whether *either* "depositing" or "spending" the proceeds of *antecedent* criminal activity, with nothing more, is sufficient to support conviction under 18 U.S.C. § 1956.

Based on all of the foregoing, this Court should grant certiorari and review the judgment of the Court of Appeals for the Fifth Circuit in Mr. Valuck's case.

CONCLUSION

For all of the foregoing reasons, Petitioner William Valuck respectfully prays that his Petition for Writ of Certiorari be **GRANTED** and the case set for argument on the merits.

William Valuck

WILLIAM VALUCK
13880-058
Maxwell Air Force Base
Montgomery, AL 36112

Date: 10/21/02